(1)

Single Bench

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR C.G.

Criminal Appeal ---413---/ 2005.

APPELLANT (IN JAIL) : Mangiyaram S/O Tejuram boga aged About 5o years R/O Ghoragaon P/S Manpur Distt. Rajnandgaon C.G.

VERSUS

NON-APPELLANT : State of Chhattisgarh. Through P.S. Manpur Distt. Rajnandgaon C.G.

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE CODE

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 413/2005

Before: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Mangiyaram

Vs.

State of Chhattisgarh

Present:
Shri Ashok Dixit, learned counsel for the appellant.
Shri Ashish Shukla, G.A. with Shri Arun Sao, G.A. for the State.

J U D G M E N T

(Delivered on 23rd day of June 2006)

This appeal is directed against the judgment dated 5.3.2005 delivered by Smt. Nirmala Singh, Special Judge, Rajnandgaon in Special Case No.115/2004 whereby the appellant was convicted under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act of 1985) and was sentenced to undergo rigorous imprisonment for four years and a fine of Rs.7,000/-, in default of the same, to undergo additional R.I. for six months.

2. Briefly stated the prosecution story is that Sub-Inspector T. Khakha P.W.4, Station House Officer, Police Station Manpur, District Rajnandgaon received secret information that the appellant was in possession of contraband *ganja* in his house at village Ghoda. After recording the secret information vide Ex.P.1, T. S.H.O. T. Khakha proceeded to the spot with Constable Kishore Kumar P.W.1, *Panch* witnesses Satish Dubey P.W.2 and Sanghratna. It appears that Sanghratna was the owner of the vehicle in which the search party

went to village Ghoda and the vehicle was driven by Satish Dubey P.W.2. After reaching village Ghodha, S.H.O. T. Khakha after complying with the necessary legal formalities searched the house of the appellant and recovered 3.200 grams of contraband *ganja* from the house of the appellant. Mustafa Khan P.W.3 weighed the *ganja* vide Ex.P.7 and found it to be 3.200 grams. Two samples of 100 grams each were taken from the aforesaid quantity of *ganja* and were sealed and the remaining quantity of *ganja* was also sealed. No material was produced by the prosecution to show that the *ganja* was entrusted for safe-custody at the *Malkhana* or to show that the Station House Officer had affixed his seal at the time of such entrustment on the sample packets as also the remaining *ganja*. The two sample packets were received by F.S.L. for examination on 18.10.2004. It was found that the sample packets had seal impression "PS/MPR". After examination, it was opined that the both the sample packets contained *ganja*. After completion of investigation, the appellant was prosecuted under Section 20(b)(ii) of the Act of 1985.

3. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined Constable Kishore Kumar P.W.1, Satish Dubey P.W.2, Mustafa Khan P.W.3 and A.S.I. T.Khakha P.W.4. Relying upon the evidence led by the prosecution, the learned trial Judge convicted and sentenced the appellant as aforesaid in paragraph-1.

4. Shri Ashok Dixit, learned counsel appearing for the appellant has argued that the evidence led by the prosecution does not establish the guilt of the appellant under Section 20(b)(ii) of the Act of 1985. It was contended that the prosecution has utterly failed to prove that the *ganja* was seized from the conscious possession of the appellant. It was further contended that neither a separate specimen

impression of the seal used to seal the sample packets was prepared nor such seal was sent to the F.S.L. There was total non-compliance of Section 55 of the Act of 1985 due to which the conviction of the appellant was bad in law. It was also contended that the possibility that the sample packets examined by the F.S.L. had been tampered with could not be ruled out since neither the *Malkhana* register was produced nor Constable Naresh Mohile No.545 who took the samples to the F.S.L. was examined by the prosecution. The memo of the Superintendent of Police through which the samples were sent to the F.S.L. was also not produced and proved by the prosecution. On these grounds it was prayed that the conviction and sentence awarded by the learned trial Judge was liable to be set aside. On the other hand, Shri Ashish Shukla, learned Government Advocate has argued in support of the impugned judgment.

5. Having heard the rival contentions, I have perused the record of Special Case No.115/2004. In a case of the present nature, it is the bounden duty of the prosecution to establish that the *ganja* was seized from the conscious possession of the appellant. A.S.I. T. Khakha P.W.4 did not state as to from which place the *ganja* was seized from the appellant. He also did not testify that *ganja* was seized from the house of the appellant. Mustafa Khan P.W.3 further contradicted the prosecution story by stating that the *ganja* was kept in a blue plastic bag in front of the house of the appellant. Satish Dubey P.W.2 has in paragraph 6 given an altogether different version and stated that the place from where the articles were recovered was a grain-shop where people used to frequently visit. The sole testimony of Constable Kishore Kumar P.W.1 that the house of the appellant was searched and *ganja* was recovered therefrom is thus rendered wholly unreliable. Thus, the prosecution has failed to

establish that *ganja* was recovered from the conscious possession of the appellant.

6. In an offence under the Act of 1985, the prosecution is also required to meticulously prove that the seals affixed on the sample packets were intact till they reached the F.S.L. Under Section 55 of the Act of 1985, the prosecution is also required to establish that the S.H.O. had, before entrusting the seized contraband *ganja* and the sealed sample packets in the *Malkhana*, affixed the seal on the sample packets and the remaining *ganja*. There is not even an iota of evidence in this regard. In the report of the F.S.L., the impression of the seal found on the sample packets is seen which does not show that it is a seal of the S.H.O. of P.S. Manpur. The prosecution has neither examined the *Malkhana Moharrir* to whom the property was entrusted nor produced a copy of the *Malkhana* register. The memo of Superintendent of Police through which the sample packets were sent to the F.S.L. was also not produced and proved by the prosecution. There is absolutely nothing on record to suggest as to on what date the sample packets were removed from the *Malkhana* and were entrusted to Constable Naresh Mohile No.545 who took the sample packets to the F.S.L. Constable Naresh Mohile was also not examined by the prosecution. Thus, the possibility that the sample packets could have been tampered with before sending to the F.S.L. can also not be ruled out.

7. The record of the learned trial Court also shows that the seized contraband articles i.e. *ganja* weighing 3 kilograms was also not produced before the learned trial Judge. Independent witness Sanghratna was also not examined by the prosecution which justifies an adverse inference against the prosecution.

8. Having thus considered the evidence led by the prosecution in its entirety, the following points emerge:

(A) There is absolutely no legal material on record to prove that contraband *ganja* was seized from the conscious possession of the appellant.

(B) The possibility that the sample packets examined by the F.S.L. had been tampered with could not be ruled out.

(C) Non-production of *Malkhana* register and the memo sent by Superintendent of Police to the F.S.L., non-examination of the independent witness Sanghratna and Constable Naresh Mohile No.545 render the entire prosecution story doubtful.

(D) There is total non-compliance of Section 55 of the Act of 1985.

In view of the above facts emerging from the evidence led by the prosecution, I am of the considered opinion that the conviction of the appellant under Section 20(b)(ii) of the Act of 1985 and the sentence awarded by the learned trial Judge deserve to be set aside.

9. In the result, the appeal is allowed. Conviction of the appellant under Section 20(b)(ii) of the Act of 1985 and the sentence awarded by the learned trial Judge are set aside. The appellant is acquitted and shall be set at liberty forthwith, if not required in any other case.

Sd/-
Dilip Raosaheb Deshmukh
Judge